UNITED STATES
v.
E. P. BRYCE ET AL.

IBLA 73-273 Decided November 14, 1973

Appeal from decision of Administrative Law Judge Robert W. Mesch (Arizona Contests Nos. A 4875 and A 5026) declaring mining claims null and void.

Affirmed.

Mining Claims: Discovery: Generally

To constitute discovery upon a mining claim, there must be exposed within the limits of the claim mineralization of such quality and quantity as to warrant a prudent man in the expenditure of his time and money with a reasonable prospect of success in developing a valuable mine.

Mining Claims: Discovery: Generally

In order to have a valid mining claim, valuable minerals must be exposed in sufficient quantities to justify development of the claim through actual mining operations. It is not enough that the mineral values exposed might justify further exploration to determine whether actual mining operations would be warranted.

Mining Claims: Contests ! ! Mining Claims: Discovery: Generally

It is the duty of a mining claimant whose claim is being contested to keep discovery points available for inspection by government mineral examiners. Mineral examiners have no affirmative duty to search for indications of a discovery

> on a mining claim; nor do they have a duty to go beyond examining the discovery points of a claimant. Their function is to examine the discovery points made available by a claimant and to verify, if possible, the claimed discovery.

APPEARANCES: Wilford R. Richardson, Esq., Richardson, Mortensen & Greenhalgh, Safford, Arizona, for appellants; Fritz L. Goreham, Esq., Office of the Field Solicitor, Department of the Interior, Phoenix, Arizona, for the contestant.

OPINION BY MRS. LEWIS

John Rhodes and Raymond Rhodes have appealed from a decision of the Administrative Law Judge dated January 18, 1973, declaring their Refuge Nos. 1, 2, 3, 4, 7, Vitoria, and Magdalena lode mining claims null and void on the grounds that the claims have not been perfected by the discovery of a valuable mineral deposit.

The Arizona State Office, Bureau of Land Management, issued contest complaints against the claims, charging, inter alia, that minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery. John Rhodes and Raymond Rhodes answered the complaints, denying the allegations that the claims are invalid, and a hearing was held by the Judge at Safford, Arizona on November 1, 1972.

We agree with the Judge's findings of fact and conclusions of law. Therefore, we adopt his decision, a copy of which is attached.

Appellants contend that the Judge misconstrued the requirement of the law as to what constitutes a valuable mineral deposit. Their reason is the law does not require claimants to have a producing mine in order to establish and hold a claim. They state even the Government's own witness testified the claims would warrant the expenditure of time and money for further exploration.

While it is not necessary to have a producing mine, the claimants still must demonstrate that there has been a valid discovery within the limits of each claim, which they have not done. In order to have a valid discovery, valuable minerals must be exposed in sufficient quantities to justify development of the claim through actual mining operations. It is not enough that the mineral values exposed might justify further exploration to determine whether actual mining operations would be warranted. See United States v. Mellos, 10 IBLA 261 (1973), and cases cited.

Appellants also assert that there is no basis to declare the Magdalena claim void because the Government offered no testimony

regarding it and Mr. Rhodes' opinion that the claims were valuable was all that was offered.

In the circumstances of the case, we find that the Judge's declaration of invalidity of the Magdalena is justified. The only testimony offered by the claimants is the opinion of Raymond Rhodes that the claim is valuable because further exploration is justified. This, even if true, is insufficient to prove a discovery. The Government mineral examiner attempted to find the claim with the help of the claimants, who were unable at the time to find it themselves. Although they apparently found it later they did not notify the Government of that fact. The description in the claim location notice (Ex. L) is so vague as to make it extremely difficult for any one, except the original locators, to pinpoint its location. 1/ As stated in United States v. Zuber, 13 IBLA 193 (1973):

> It is the duty of a mining claimant, whose claim is being contested, to keep discovery points available for inspection by government mineral examiners. Mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim; nor do they have a duty to go beyond examining the discovery points of a claimant. Their function is to examine the discovery points made available by a claimant and to verify, if possible, the claimed discovery. United States v. Stevens, 76 I.D. 56 (1969); United States v. Humboldt Placer Mining Company, 8 IBLA 407 (1972); United States v. Mullin, 2 IBLA 133 (1971).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed.

Anne Poindexter Lewis
Member

We concur:

Frederick Fishman
Member

Joseph W. Goss
Member

1/ The notice describes the claim as being located "about one and one half mile in a westerly direction from the peack (sic) of Turnbull [Mt. Turnbull] and abut (sic) half mile in a Northerly direction from the New York a John Parks claim."

January 18, 1973

DECISION

UNITED STATES OF AMERICA, Contestant	:	ARIZONA 4875
v.	:	Involving the validity of the Refuge Nos. 1, 2, 3, 4 and 7 lode mining claims, situated in T. 4 S., R. 20 E., GSR Meridian, Graham County, Arizona.
E. P. BRYCE, HEIRS OF WM. C. RHODES, deceased: JOHN RHODES RAYMOND RHODES, Contestees	:	
. . . . .		
UNITED STATES OF AMERICA, Contestant	:	ARIZONA 5026
v.	:	Involving the validity of the Vitoria and Magdalena lode mining claims, situated in T. 4 S., R. 20 E., GSR Meridian, Graham County, Arizona.
JOSE MARIA EREDIA, JOHN H. McMURREN, JOHN RHODES and RAYMOND RHODES, Contestees	:	

Preface

Pursuant to 43 CFR, Part 4, the Arizona State Office, Bureau of Land Management, Department of the Interior, issued complaints challenging the validity of the subject mining

claims. The complaints, as amended, charged (1) that "the land embraced within the claims is nonmineral in character," (2) that "minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery," and (3) that "the locations are not distinctly marked on the ground so that their boundaries can be readily traced."

John Rhodes and Raymond Rhodes answered the complaints and denied the allegations that the mining claims are invalid. The Rhodes assertedly have some undisclosed interest in the claims by reason of the fact that their father, William C. Rhodes, was one of the original locators of the Refuge claims and by reason of the fact that their grandfather, Jose Maria Eredia, was one of the original locators of the Vitoria and Magdalena claims. No answer was filed with respect to the interest, if any, of E. P. Bryce, the other original locator of the Refuge claims or with respect to the interest, if any, of John H. McMurren, the other original locator of the Vitoria and Magdalena claims.

The two cases were consolidated and a hearing was held on November 1, 1972, at Safford, Arizona. The contestant was represented by Fritz L. Goreham, Office of the Solicitor, Department of the Interior, Phoenix, Arizona. The contestees, John Rhodes and Raymond Rhodes, were represented by Wilford R. Richardson of the law firm of Richardson, Mortensen & Greenhalgh of Safford, Arizona.

The Law

Before considering the evidence, it would seem worthwhile to set forth certain principles of law that are applicable to this proceeding.

In order for a mining claim to be valid, there must be a discovery of a valuable mineral deposit (as distinguished from a mere finding of some mineralization) within the limits of the claim.

In East Tintic Consolidated Mining Company, 40 L.D. 271 (1911), the Department stated:

> . . . The exposure, however, of substantially worthless deposits on the surface of a claim; the finding of mere surface indications of mineral within its limits; the discovery of valuable mineral deposits outside the claim; or deductions from established geological facts relating to it; one or all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral deposit exists within the claim, will neither suffice as a discovery thereon, nor be entitled to be accepted as the equivalent thereof. . . . (p. 273)

The East Tintic case, together with other similar Departmental decisions, was cited with approval by the Court in Henault Mining Company v. Tysk, 419 F. 2d 766 (9th Cir., 1969), cert. den., 398 U.S. 950 (1970), in support of the proposition that:

> . . . A reasonable prediction that valuable minerals exist at depth will not suffice as a "discovery" where the existence of these minerals has not been physically established. (p. 768)

A valuable mineral deposit is an occurrence of mineralization of such quality and quantity as to warrant a person of ordinary prudence in the expenditure of his time and money for the development of a mine and the extraction of the mineral. The mineral deposit that has been found must have a present value for mining purposes.

In Chrisman v. Miller, 197 U.S. 313 (1905), the Court quoted with approval:

> . . . the mere indication or presence of gold or silver is not sufficient. . . . The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral. . . . (p. 322)

In United States v. Coleman, 390 U.S. 599 (1968), the Court stated:

> . . . The Secretary of the Interior held that to qualify as "valuable mineral deposits"

> under 30 U.S.C. § 22 it must be shown that the mineral can be "extracted, removed and marketed at a profit" ! ! the so ! called "marketability test." (p. 600)
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> * * *
>
> . . . the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is "valuable." It is a logical complement to the "prudent ! man test" which the Secretary has been using to interpret the mining laws since 1894. . . . (p. 602) [1/]

An occurrence of mineral that simply warrants the further expenditure of labor and means in prospecting or exploration in an effort to ascertain whether the mineralization that has been found is sufficient (or whether other mineralization might be found that might be sufficient) to justify the actual working of the property does not constitute a valuable mineral deposit within the purview of the mining laws. The test is whether the facts warrant the development of the property, and not whether the facts warrant prospecting or exploration in an attempt to ascertain whether the property might warrant development.

In Chrisman v. Miller, supra, some oil had been found seeping at the surface within the limits of an oil placer mining claim. The Court stated with respect to this finding of mineralization:

> It does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration. (p. 320)

1/ The Departmental decision in Castle v. Womble, 19 L.D. 455 (1894), announced the "prudent ! man" test as follows:

> . . . where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. (p. 457)

In Converse v. Udall, 262 F. Supp. 583 (D. Ore., 1966), 399 F. 2d 616 (9th Cir., 1968), cert. den., 393 U.S. 1025 (1969), the Courts affirmed the action of the Department of the Interior in drawing a sharp distinction between "exploration" for and "discovery" of a valuable mineral deposit. Both Courts recognized, as stated by the District Court, that:

> . . . if one has found only enough mineral to justify further "exploration," as yet he has not made a "discovery," but if he has found enough mineral to justify a "development," then a "discovery" has been made. (p. 595)

Where there has been ample time for the development of a mine, "the most persuasive evidence as to what a man of ordinary prudence would do with a particular mining claim is what men have, in fact, done or are doing, not what a witness is willing to state that a prudent man would do." See United States v. Adam J. Flurry, A-30887 (March 5, 1968), and United States v. Calhoun and Howell of Oregon Ltd., A-31004 (August 29, 1969). In United States v. Vernon O. and Ina C. White, 72 I.D. 522 (1965), the Department stated:

> . . . it passes belief that in the 38-39 years elapsing until the hearing appellants mined only 6 ounces of gold. How long were they going to wait before commencing a mining operation, and, more importantly, why were they waiting? The answer seems plain ! ! that they have not yet found any values sufficient to warrant development. (p. 526)

Background

The Vitoria and Magdalena claims were located on December 17, 1901, by John McMurren and Jose Maria Eredia. The five Refuge claims were located on August 5, 1913, by William C. Rhodes and E. P. Bryce. The claims are situated near the south boundary of the San Carlos Indian Reservation on lands that were withdrawn in 1934 from all forms of disposal pending restoration to tribal ownership. See 54 I.D. 559 (1934). The claims are between Safford and Globe, Arizona. They are in an area of extremely rough terrain that is

negotiable only by foot. The nearest vehicular road is about two miles from the claims. While there are some old workings on the claims, there is no record or other evidence that any minerals have been produced from the claims.

The Refuge and Vitoria Claims

Robert A. McColly, a geologist employed by the Bureau of Land Management, inspected the five Refuge claims and the Vitoria claim in April of 1972. He was accompanied by John and Raymond Rhodes. The mining claimants pointed out various features of interest including the areas containing the best showings of mineralization. Mr. McColly took a sample from each of the claims and had the samples assayed for gold, silver and copper. The assays showed insignificant values for gold and silver. Some of the assays were of interest from the standpoint of copper values.

Mr. McColly expressed the opinion, based upon his education, experience and examination of the claims, that sufficient mineralization had not been found within the claims to justify a person of ordinary prudence in commencing a mining operation or in developing the claims. He discounted the copper values on the basis that there simply was not a sufficient quantity of the mineralization present to warrant any type of a mining operation. He stated that at best the claims would only warrant the expenditure of time and money for exploration work.

The only evidence presented by the contestees consisted of the testimony of Raymond Rhodes. He has several years experience in prospecting and has six semester hours credit in mineralogy and geology at the college level. He testified:

> Q. Now as the owner of the claims, do you have an opinion as to whether or not they are valuable claims?
>
> A. Yes, I do. I think they are valuable and justify exploration ! ! further exploration. (Tr. 64)

The evidence clearly establishes, as charged in the complaints, that "minerals have not been found within the limits of [these claims] in sufficient quantities to constitute a valid discovery."

The evidence is not sufficient to reach any conclusion as to whether the land within the claims is mineral or non ! mineral in character.

No evidence was presented by the Bureau in support of the remaining charge in the complaints that "the locations [of these claims] are not distinctly marked on the ground so that their boundaries can be readily traced." The evidence presented by the mining claimants indicates that the claims are marked on the ground.

The Magdalena Claim

During the April 1972 trip to the claims, Mr. McColly and the mining claimants attempted to find the Magdalena claim. They were not successful. Accordingly, the Bureau did not present any testimony with respect to the mineralization on this claim.

After the April 1972 trip, the mining claimants returned to the area and allegedly found the Magdalena claim. Raymond Rhodes testified:

> Q. How did you identify it as the Magdalena?
>
> A. Well, my grandfather told my father what it was like, how it looked, the vein and everything, and then by comparing the location with the area that it should be in, it has to be the place because there are no other mineralized veins like that that I could find in the area. (Tr. 65)

The mining claimants did not notify the Bureau that the claim had been found.

While the Bureau did not present any testimony relating to the discovery of a valuable mineral deposit on this claim, I believe the evidence does support the conclusion that a

mineral deposit has not been found within the limits of this claim of sufficient value to warrant a mining operation. The claim was located in 1901. There is a record of some mineral production from the area, but no record of any production from this claim over the past 70 some years. Those asserting an interest in the claim were apparently not sufficiently interested in the claim to even attempt to find the claim prior to the time of the Bureau contest. In addition, I construe the above testimony of Raymond Rhodes, "as the owner of the claims," that he thinks "they are valuable and justify exploration ! ! further exploration" as applying to all of the claims including the Magdalena claim.

The evidence relating to the effort that was made to find the Magdalena claim is not sufficient to support the charge that the location was not distinctly marked on the ground.

The evidence is not sufficient to reach any conclusion as to whether the land within this claim is mineral or non ! mineral in character.

ORDER

Pursuant to the prayers of the complaints, the Refuge Nos. 1, 2, 3, 4 and 7, the Vitoria and the Magdalena lode mining claims are declared null and void on the grounds that the claims have not been perfected by the discovery of a valuable mineral deposit.

Robert W. Mesch
Administrative Law Judge

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